

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Geographic Partitioning and Spectrum)
Disaggregation by Commercial Mobile)
Radio Services Licensees)

WT Docket No. 96-148

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REPLY COMMENTS OF OMNIPOINT CORPORATION

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Summary

Like a large majority of the participants in this proceeding, Omnipoint supports the Commission's geographic partitioning and spectrum disaggregation proposals. The initial round of comments has strengthened the case for flexible partitioning and disaggregation rules, both to help small, disadvantaged entities enter the PCS market and to encourage faster deployment of a wider range of more efficient wireless services to underserved areas.

The initial comments bolster Omnipoint's contention that the Commission does not need to make major changes to its other regulations as it liberalizes the partitioning and disaggregation rules. As most of the participants recognize, the NPRM's proposals would encourage competition, and additional construction requirements or other regulatory obligations would be counterproductive.

The record supports the view that the Commission should allow an even greater range of options than contemplated by the NPRM. Specifically, the Commission should permit partitioning and disaggregation of licensed spectrum into geographic areas and amounts of bandwidth smaller than the minimum thresholds proposed in the NPRM. The freedom to assign smaller areas and amounts of bandwidth would increase efficiency and flexibility. Equally important, added flexibility would avoid giving some PCS protocols an inadvertent advantage over others as a consequence of differing spectrum requirements.

With respect to repayment, the proportional application of the penalties required under current rules are adequate to prevent unjust enrichment. Likewise, the current build-out requirements are sufficient to ensure that PCS operators provide service as rapidly as possible. More stringent construction requirements may actually inhibit partitioning and disaggregation arrangements that would result in faster deployment to remote areas.

Finally, Omnipoint reiterates its proposal that all PCS operators, including entrepreneurial entities, be permitted to exchange equal amounts of spectrum within any market, especially when conducive to the resolution of adjacent channel interference.

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REPLY COMMENTS OF OMNIPPOINT CORPORATION

Introduction

Omnipoint Corporation, by its attorneys, files this reply in response to the initial comments solicited by the Commission in the above-captioned proceeding.¹

The initial comments have reinforced the case for flexible partitioning and disaggregation rules, both to help disadvantaged entities enter the PCS market and to encourage faster deployment of a wider range of more efficient wireless services to underserved areas. The record supports Omnipoint's view that the NPRM's proposed approach can advance these goals while reducing the need for regulation.

I. The Record Shows That Flexible Partitioning And Disaggregation Rules Would Encourage Diversity And Increase Competition

A large majority of the commenters agree that the flexible partitioning proposals contained in the NPRM would bring more companies -- including small and minority or woman-owned businesses -- into the PCS marketplace by reducing the amount of capital necessary to enter the business and by making it practical to serve smaller and less

¹ In the Matter of Geographic Partitioning and Disaggregation by Commercial Mobile Radio Services Licensees, Notice of Proposed Rulemaking, FCC 96-287 (July 15, 1996) ("NPRM").

densely populated areas or to offer specialized services.² Many commenters suggest that the same principle applies to disaggregation, because disadvantaged entities are better able to finance the acquisition of smaller increments of spectrum than an entire 30 or 10 MHz license.³

Flexible partitioning and disaggregation would increase the number as well as the variety of PCS providers offering service.⁴ This is particularly true in sparsely populated areas of existing license territories.⁵ The Commission should have little trouble concluding, as it has in a number of other proceedings,⁶ that more flexibility for wireless licensees would stimulate competition and innovation and broaden consumer options.⁷

² NPRM at ¶¶ 6, 11; Comments of NextWave at 1; Comments of GTE at 3; Comments of AT&T Wireless at 2; Comments of US West at 8; Comments of BellSouth at 4; Comments of PCIA at 2; Comments of USTA at 3; Comments of CTIA at 4; Comments of Western Wireless at 3.

³ A variety of commenters contend that the NPRM's proposed disaggregation rules would remove a significant barrier to entry into the PCS market. *See, e.g.*, Comments of PCS of Wisconsin at 5; Comments of GTE at 6. Additionally, flexible partitioning and disaggregation will help existing licensees obtain access to capital so they can build and maintain their networks. Comments of NextWave at 2; Comments of AT&T Wireless at 2; Comments of US West at 5.

⁴ Comments of NextWave at 1; Comments of AT&T Wireless at 3; Comments of Sprint Spectrum at 2; Comments of US West at 5; Comments of PCIA at 2; Comments of CTIA at 3; Comments of SR Telecom at 4-6; Comments of Western Wireless at 3.

⁵ *See* Comments of Sprint Spectrum at 2; Comments of US West at 6; Comments of BellSouth at 4; Comments of SR Telecom at 5-6; Comments of Western Wireless at 3.

⁶ *See e.g., First Report and Order*, WT Dkt. No. 96-6, FCC 96-283 at ¶ 9 (rel. Aug. 1, 1996) ("Fixed Wireless R&O") Other commenters note that removal of restrictions on partitioning and disaggregation would be consistent with the Commission's treatment of other services. *See, e.g.*, Comments of US West at 9; Comments of CTIA at 4.

⁷ Fixed Wireless R&O at ¶¶ 3, 58.

Flexible partitioning and disaggregation rules are likely to prove even more desirable as developments in marketing and technology create a wider array of PCS services. Omnipoint agrees that "[p]ersonal communications requirements are changing rapidly as our society becomes more mobile and the demand for near instantaneous communications and universal access increases."⁸ At the same time, technological innovation is likely to change the amount and type of spectrum necessary to provide wireless services. PCS operators, for instance, currently employ several different air interface technologies, e.g., GSM, IS-661, TDMA, and CDMA, and each of these technologies requires different channelization. The Commission correctly perceives that added flexibility may be necessary for new services to become competitive and for first-generation PCS services to grow and flourish.⁹ Omnipoint believes that in setting partitioning and disaggregation rules, maximum flexibility is also necessary to ensure that no technology or service is given an inadvertent regulatory advantage over competitors.¹⁰

Several rural telephone companies object to the Commission's proposal to allow other entities to enter partitioning arrangements with licensees who acquired

⁸ NPRM at ¶ 40; see also Fixed Wireless R&O at ¶ 22.

⁹ NPRM at ¶ 14.

¹⁰ As Omnipoint noted in its initial comments, a flexible market-based approach is also most consistent with the intent of Congress as expressed in the Telecommunications Act of 1996, Pub. L. No. 104-104, §§ 251-261 ("the 1996 Act"). The 1996 Act was designed to foster competition and remove barriers to innovation in the communications industry. See S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996) (discussing purposes of 1996 Act); see also Fixed Wireless R&O at ¶ 23 (noting 1996 Act's goal was to "make available the most competitive environment possible for communications services").

spectrum through the auction process.¹¹ Essentially, the rural telephone companies argue that flexible partitioning would undercut the preference currently enjoyed by rural telephone companies.¹² The existing rules, these commenters contend, are intended to give rural telephone companies leverage to negotiate partitioning deals.¹³

Omnipoint sees no need to engage in an exhaustive rebuttal of the patently self-serving arguments advanced by these rural telephone companies. Suffice it to say that these commenters improperly form their interest in obtaining cheap PCS spectrum with the public's interest in encouraging service in rural areas. But, the rural telephone companies fail to provide any reason why the Commission or the public is better served if rural telephone companies *alone* have the right to obtain partitioned rural areas to provide commercial mobile service. If rural telephone companies are as well-qualified to provide rural America with mobile service as they claim to be,¹⁴ then this superior market position will continue to prevail under the proposed more flexible partitioning rules. Because the proposed new rules would actually make partitioning to rural telcos even easier than under the existing rules, these entities are also better off under the proposed rules.

¹¹ See, e.g., Comments of NTCA at 2; Comments of RTG at 6; Comments of Century at 1-2.

¹² See, e.g., Comments of NTCA at 2; Comments of RTG at 6; Comments of Century at 1-2.

¹³ Comments of NCTA at 3-4; Comments of USTA at 4.

¹⁴ See, e.g., Comments of RTG at 3 ("the Commission is opening the door for less-qualified entities to undertake the responsibility of ensuring that the rural areas of the country receive quality, innovative PCS services in a timely manner"); Comments of OPASTCO at 6 (asserting that rural telephone companies are in the "best position" to serve rural consumers).

The rural telephone companies do not explain why other entities would seek to acquire partitioned licenses to serve rural areas absent a genuine interest in providing service, nor do they explain why an existing licensee would refuse to partition a rural area it had no intention of serving. Omnipoint agrees with Western Wireless that by granting rural telephone companies the exclusive right to enter partitioning agreements, the current rules encourage inefficiency and give the rural telephone companies undue bargaining power.¹⁵ The public is more likely to receive the most efficient service if the entity acquiring the partitioned spectrum is willing and able to pay the highest price. In any event, any incidental harm to rural telephone companies is vastly outweighed by the public benefits resulting from the partitioning rules proposed in the NPRM.

II. The Comments Demonstrate That Abuses Of Flexible Partitioning and Disaggregation Can Be Prevented with Minor Changes to Existing Rules

In the past, the Commission has expressed concern that relaxed partitioning and disaggregation policies might encourage licensees to circumvent system build-out requirements, stockpile spectrum in order to keep competitors out of the market, or reap unjust financial benefits from the sale of their licenses. A number of other commenters agree with Omnipoint that, at least in the context of the flexibility introduced by the proposals in the NPRM, these concerns are somewhat misplaced.¹⁶ The principles embodied in the Commission's existing build-out, spectrum cap, and unjust enrichment rules are sufficient to prevent abuses. Geographic partitioning and spectrum

¹⁵ Comments of Western Wireless at 4.

¹⁶ See, e.g., Comments of AT&T Wireless at 3-4 (arguing that Commission's concerns were misplaced and that a market-based approach would better promote the public interest); see also Comments of US West at 3-5; Comments of PCIA at 4-5.

disaggregation do not create any incentive for abuse that would require additional countervailing regulatory measures.

A. No Additional Construction Requirements Should Be Imposed

Omnipoint believes that the construction requirements for a partitioned license or disaggregated spectrum should be no more stringent than the Commission's current build-out rules.¹⁷ Although partitioning and disaggregation will most likely result in increased build-out, the Commission should not mandate additional build-out. See Comments of Omnipoint at 6-7.

Under the Commission's proposed build-out requirement for partitioning and disaggregation, though, the parties must agree at the time of the assignment application to conform to one of two build-out options: (1) the initial licensee (the "partitioner" or "disaggregator") and the assignee (the "partitionee" or "disaggregatee") each assume independent obligations to fulfill the construction requirements as applied to their partitioned service areas,¹⁸ or (2) the partitioner, having met its five-year build-out obligation, certifies that it will meet the ten-year construction requirement applicable to the original license, and the assignee agrees to meet the substantial service requirement at the end of the ten-year term of the initial license.¹⁹

In Omnipoint's view, the Commission should retain the first part of the proposed test, but should modify the second part to allow either party, or both parties, to meet the initial five-year and the ten-year build-out requirements for the entire initial license

¹⁷ See 47 C.F.R. § 24.203(a)&(b).

¹⁸ NPRM at ¶ 33.

¹⁹ NPRM at ¶ 34.

area.²⁰ Under this slightly relaxed version of the NPRM's proposed test, construction would reach at least as many consumers as would have been required without partitioning or disaggregation. Moreover, the partitionee will have every reason to provide additional service after having invested in acquiring part of the licensed territory or spectrum, so consumers will have more service options in the long run.²¹ By contrast, added build-out requirements imposed as a condition of partitioning may deter assignments of underserved areas, especially late in the license term.²²

In short, the build-out rules for PCS are well-established and need not change.

**B. Existing Repayment Rules Can Be Adapted
To Prevent Unjust Enrichment**

Omnipoint proposes that the parties to any partitioning or disaggregation agreement should be free to negotiate payment terms with a minimum of government oversight and submits that the price paid by the assignee to the assignor is not relevant to the Commission's unjust enrichment rules so long as those rules are properly enforced, regardless of the PCS license at issue. Omnipoint concurs with AT&T Wireless and others who argue that "[b]ecause open auctions assure that a licensee pays full market value, disaggregation and partitioning raise no unjust enrichment issues,"²³ at least where

²⁰ See Comments of AT&T Wireless at 5; Comments of Bell South at 11; Comments of US West at 14; Comments of BellSouth at 10; Comments of Sprint Spectrum at 11; Comments of PCIA at 7.

²¹ Comments of GTE at 5 ("Partitionees, having invested substantial resources to obtain their licenses, will likely build-out the network as soon as economically possible in order to recoup their investment."); Comments of Bell South at 11; Comments of PCIA at 7; Comments of Western Wireless at 3.

²² See Comments of US West at 13.

²³ Comments of AT&T Wireless at 3.

non-entrepreneur block spectrum is concerned. The Commission should not compel public disclosure of competition-sensitive information about financial arrangements between the parties because the auction price for the initial license has been set and the assignment does not threaten "recovery for the public of a portion of the value of the public spectrum."²⁴

Some commenters argue that even if the original licensee received preferential repayment terms based on its status as a small or entrepreneurial entity, it should not be required to make accelerated payments when partitioning or disaggregating PCS spectrum to an entity that is not and would not have been eligible for the same repayment plan.²⁵ *Omnipoint, by contrast, recognizes that the accelerated repayment and anti-trafficking rules should remain in force in order to maintain the policy purposes of the entrepreneur's blocks. The principles underlying the existing entrepreneur-band rules can be readily applied to the partitioning and disaggregation of entrepreneur-band spectrum.* For example, existing Block C or F transfer restrictions²⁶ and unjust enrichment rules²⁷ should continue to apply to partitioned or disaggregated entrepreneur-band spectrum. In particular, the assignor-auction winner (and not the assignee) should continue to be responsible for auction payments, including unjust enrichment penalties.²⁸

²⁴ 47 U.S.C. §309(j)(3)(C).

²⁵ See, e.g., Comments of NextWave at 3; Comments of AirGate Wireless at 5-6; Comments of USTA at 7.

²⁶ 47 C.F.R. §24.839(d); Report and Order, WT Dkt. No. 96-59, GN Dkt. No. 90-314, FCC 96-278, at ¶¶ 83-85 (rel. June 24, 1996).

²⁷ 47 C.F.R. §1.2111(b)-(d).

²⁸ Omnipoint objects to Cook Inlet's position that the Commission should check an assignee's credit worthiness. Comments of Cook Inlet at 5. Since these procedures are not even required of the initial licensee, it is unnecessary to engage in potentially

(Footnote continued to next page)

The commenters support Omnipoint's contention that any unjust enrichment penalty resulting from an entrepreneur-band license partition or disaggregation should be based on the ratable portion of the licensed spectrum that is disaggregated or the geographic area partitioned.²⁹ The Commission should modify the unjust enrichment rules to provide that: (1) where disaggregation is involved, the amount of unjust enrichment is to be assessed in the proportion that the Block C or F spectrum disaggregated bears in relation to the total spectrum of the original license, and (2) where partitioning is at issue, the amount of unjust enrichment is to be judged by the proportion the population in the partitioned area bears to the total population in the original license territory. In the case of a combination of geographic partitioning and spectrum disaggregation, a MHz-pops calculation could be applied to calculate the unjust enrichment penalty.³⁰

III. The Commission Should Allow More Flexibility In Partitioning And Disaggregation

The Commission can and should broaden the range of proposed partitioning and disaggregation options by allowing the division of licenses into smaller geographic units and portions of bandwidth. Added flexibility could optimize the efficiencies of partitioning and disaggregation without creating significant administrative burdens.

(Footnote continued from previous page)

ambiguous issues of the assignee's credit worthiness especially if that assignee owes no contribution directly to the government.

²⁹ The commenters support Omnipoint's contention that any unjust enrichment rules should impose penalty payments based on the proportion the population of the partitioned area bears to the population of the entire license area. See, e.g., Comments of PCS of Wisconsin at 3; Comments of BellSouth at 15.

³⁰ The Commission should allow licensees to freely combine geographic partitioning and spectrum disaggregation. Comments of PCS of Wisconsin at 6; Comments of GTE at 9-10; Comments of Sprint Spectrum at 12.

A. Partitioning Should Be Allowed in Areas Smaller Than Counties

Many commenters suggest that the NPRM's proposed county-based limit on partitioned areas is unduly restrictive.³¹ A consensus of commenters support partitioning of areas smaller than counties, including along municipal lines, local exchange service territories, or other smaller geopolitical units.³² As Sprint Spectrum put it, "The Commission's proposal to require partitioning along county lines will needlessly complicate matters for partitioning parties [S]ervice areas will not always fall naturally along county lines."³³ A significant problem with a county-based minimum is that "[i]n many geographically large counties . . . populations are clustered in a relatively small portion of the county. In these instances, it may not be economically desirable to partition the entire county."³⁴ The result would be to discourage partitioning deals that would bring service to communities not reached by existing licensees.³⁵ On close reading, the few comments

31 See, e.g., Comments of PCS of Wisconsin at 2; Comments of Sprint Spectrum at 4; Comments of US West at 17.

32 Comments of PCS of Wisconsin at 2; Comments of AirGate Wireless at 3; Comments of Carolina Independents at 3-5; Comments of US West at 16; Comments of BellSouth at 5; Comments of PCIA at 3. As BellSouth points out, existing partitioning rules -- designed for rural telephone companies -- are not limited to county lines, but provide counties as an example of an acceptable geographic area. Comments of BellSouth at 6

33 Comments of Sprint Spectrum at 4; see also Comments of SR Telecom at 9.

34 Comments of Sprint Spectrum at 4; see also Comments of US West at 17; Comments of Bell South at 7.

35 Comments of Bell South at 7; Comments of SR Telecom at 9.

that express support for the county-based limit appear to advocate rules allowing partitioned areas *at least* as small as counties and do not oppose smaller units.³⁶

Omnipoint maintains that a county-based limit would sacrifice a substantial measure of market flexibility, because some counties are extremely large and have widely varying characteristics.³⁷ Additionally, many potential partitionees run other businesses that operate in smaller franchise or service areas, such as industrial zones, municipal lines or portions of counties. The Commission should permit partitioning along any cognizable geographic unit, e.g., towns, cities, industrial zones, and franchise areas in order to gain the full benefit of flexible partitioning. If necessary, the Commission could require partitioning parties to provide a detailed map of the partitioned areas, in both electronic and hard-copy format. Omnipoint concurs with the Carolina Independents' suggestion that "[p]arties should be permitted to adopt boundaries that are not based solely on county lines if they agree to bear the administrative burden of making available, and certifying as accurate, detailed service area maps, information as to the population count for each partitioned area, and information showing how the population figures were calculated."³⁸

B. Licensees Should Be Allowed To Disaggregate Spectrum In Smaller Amounts

³⁶ For example, GTE supports the NPRM's county-based rule, but adds that it opposes any minimum area threshold on the grounds that "[t]he absence of geographic size limitations will give parties more flexibility to complete partitioning deals." Comments of GTE at 4.

³⁷ The availability of waivers would be insufficient, because waiver applications would present administrative burdens on new entrants in the PCS market. Comments of PCS of Wisconsin at 2. Waiver applications would also cause unnecessary delays and uncertainty. Comments of Sprint Spectrum at 4; Comments of PCIA at 3.

³⁸ Comments of Carolina Independents at 5.

The Commission should allow the maximum degree of disaggregation that can be readily administered. Apart from the potential for new opportunities noted previously, disaggregation would encourage efficiency by providing licensees with a way to divest themselves of spectrum they are unable to use for the services they provide and to acquire additional increments of spectrum that their technology and customers may require. The 1MHz threshold suggested by the NPRM, though, probably would leave significant amounts of spectrum unused, because PCS technologies do not operate within such "round" amounts of bandwidth. Additionally, some services will not require paired frequencies, or they may use a disproportionate amount of spectrum on a single channel, leaving unused capacity in the other half of the pair. In short, different technologies and service applications require different channelizations and bandwidths.

Paired 1 MHz minimum increments would put some technologies at a disadvantage relative to others and leave inefficiencies that might well otherwise be corrected by market forces. Omnipoint notes that none of the current four mobile PCS technologies are divisible evenly into one MHz units, and they range from as little as 60 KHz to 2.5 MHz. In addition, the guard bands necessary between different PCS networks vary depending on the PCS technologies that are adjacent to one another. We see no reason to prevent two parties from splitting, for example, a 10 MHz license into 6.4 and 3.6 MHz Blocks. In light of the problems and disparities created by rigid divisibility rules, the Commission should not establish *any* minimum units of spectrum; the parties should be able to negotiate spectrum amounts without regulatory barriers.³⁹

³⁹ While AirGate Wireless contends that bandwidths of less than 5 MHz should not be partitionable, the Commission should let the market decide what is or is not an appropriate bandwidth. C.f., Comments of AirGate Wireless at 6.

The potential for unwieldy degrees of disaggregation is not great, because the initial licensee and the assignee both have an interest in maintaining functional and workable portions of bandwidth. This practical consideration would keep reasonable limits on the division of spectrum while minimizing potential unfairness and waste, and it might also create additional opportunities for niche services to use leftover spectrum.

IV. Entrepreneurs Should Be Allowed To "Swap" Spectrum With Other Licensees

The NPRM's proposals to allow A, B, D, and E block licensees to partition their licenses to eligible entities at any time⁴⁰ and to give C and F block licensees limited authority to partition⁴¹ are helpful, but they should be extended. The C and F block partitioning limits are slightly more conservative than necessary, because the proposed partitioning would not allow "swaps" for equivalent amounts of spectrum and territory between entrepreneurs and non-entrepreneurs. For example, under the NPRM's proposal, a Block B licensee would be prevented from partitioning a portion of its license to the Block C licensee in return for the Block C spectrum; or, a Block F licensee would be restricted from exchanging its license with the Block F licensee or for a partitioned and disaggregated 10 MHz BTA license from the Block A licensee. Omnipoint can think of no reason to forbid these kinds of transactions.

The C and F blocks were established to create opportunities for small and entrepreneurial companies and to ensure diversity of ownership in the PCS industry *at the time of auctioning*, but the Block C BTA spectrum (1895-1910, 1975-90 MHz) or the Block F BTA spectrum (1890-95, 1970-75 MHz) do not hold any intended technical

⁴⁰ NPRM at 3.

⁴¹ NPRM at 4.

characteristics specific to entrepreneurs. Once the auctions are completed, the public policy purposes of the set-aside are in no way diminished if an entrepreneur with a 10 MHz F Block license is permitted to swap it for the 10 MHz D Block license. With spectrum swapping, all licensees in the market are better off and the parties mutually avoid interference issues that can arise under the current market conditions with deployment of multiple incompatible technologies. More efficient arrangement of the licensees along the spectrum would also lead to quicker introduction of PCS services, at lower costs to small business and the consumer.

Omnipoint's spectrum swapping proposal does not in any way undermine the Commission's unjust enrichment policies. Under Omnipoint's proposal, entrepreneurs would retain the same amount of spectrum over the same licensed territory as it won in the auction. Unlike situations where a small business simply sells its spectrum to a large company and earns a margin on the basis of the Commission's discounts for small businesses, no small business licensee would be cashing out of the market. Instead, spectrum swapping would permit all licensees in a given market, including small business licensees, to resolve interference and other technical issues privately, without resort to the Commission's dispute processes. The substance of the comments filed, emphasizing flexibility and market-driven solutions, is fully consistent with Omnipoint's proposal.

Conclusion

For the reasons stated in this Reply and its initial comments, Omnipoint urges the Commission to adopt flexible and efficient geographic partitioning and spectrum disaggregation rules for broadband PCS.

Respectfully submitted,

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